Nos. 83-703 and 83-1031

In the Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

JOETTE LORION, ET AL.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR FEDERAL PETITIONERS

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Respondents' legal argument is principally based on one proposition: that Congress used the word "proceeding" in Section 189(a) of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) to refer only to those formal agency undertakings in which hearings must be held as a matter of course. Respondents also advance a practical argument, asserting that the courts of appeals would in any event need the assistance of the district courts to review agency decisions that had not been preceded by hearings. We shall answer these points in order.

1. Respondents assert that the "proceedings" described in Section 189(a) are those in which the NRC must hold hearings. They rely primarily on the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*), suggesting that the APA defines "proceeding" to include only formal agency undertakings accompanied by a hearing (Resp. Br. 46, 48-50). Because Section 189(b) provides for review in the courts of appeals of "[a]ny final order entered in any proceeding of the kind specified in [Section 189](a)," respondents conclude that "the kind" of agency actions susceptible to court of appeals review are those in which hearings must be held (see Resp. Br. 15). Respondents add that the legislative history of Section 189 and the NRC's own interpretation of the statute supports their reading.

a. Respondents' analysis of the APA plainly is incorrect. That statute defines "agency proceeding" to include "licensing" and "adjudication" (5 U.S.C. 551(12), (9) and (7)). These latter terms are defined broadly to include a range of informal agency action. Thus licensing "includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license" (5 U.S.C. 551(9)). Adjudication "means agency process for the formulation of an order" (5 U.S.C. 551(7)), and order is in turn defined to "mean[] the whole or a part of a final disposition * * * of an agency in a matter other than rule making" (5 U.S.C. 551(6)). This includes, of course, dispositions reached without the benefit of a hearing. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975); *Camp* v. *Pitts*, 411 U.S. 138, 141 n.3 (1973); *Izaak Walton League* v. *Marsh*, 655 F.2d 346, 361-362 & n.37 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981).[1] In short, the word "proceeding" as it is used in the APA encompasses informal administrative actions that do not involve a hearing.

b. It is equally plain that respondents' reading of the word "proceeding" finds no support in Section 189(a) itself. Because the statute states that the NRC "shall" hold a hearing in any proceeding in which one is requested, respondents evidently mean to suggest that an administrative undertaking in which a hearing is not held cannot be a proceeding (see Resp. Br. 46). But as our opening brief demonstrated, a hearing is not the defining characteristic of a "proceeding": Section 189(a) explicitly makes provision for proceedings in which no hearings have been held (Br. 13), while decisions both of this Court and of the courts of appeals suggest that — despite the use of the word "shall" in the statute — in many instances a proceeding may be terminated before a hearing is held (Br. 13-14, 19-20). Again, then, Section 189(a) does not itself equate proceedings with formal, on the record administrative inquiries.

c. Despite respondents' suggestions to the contrary, the legislative history of Section 189 is consistent with this broad reading of the word "proceeding." Respondents correctly note that Congress in Section 189(b) provided for review under the Administrative Orders Review (Hobbs) Act (28 U.S.C. 2341 *et seq.*) only of "certain agency actions" (S. Rep. 1699, 83d Cong., 2d Sess. 29 (1954)) (see Resp. Br. 56), and that Section 189(a) was then written to provide for hearings only in the types of actions covered by Section 189(b) (see Resp. Br. 57-58; Br. 28). But this history provides

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[1]The APA mandates the use of formal hearing procedures in rulemaking or adjudication only when the statute involved requires a hearing on the record. See *United States* v. *Florida E. C. Ry.*, 410 U.S. 224, 241 (1973); 5 U.S.C. 554.

no support whatsoever for respondents' further conclusion that review in a court of appeals is available only after a hearing has taken place.

As we explained in our opening brief, the "certain agency actions" covered by Section 189(b) are those related to licensing: Congress took pains to allow for review under that provision of all agency orders involving the licensing process (Br. 24-27).[2] Congress then attached the right to a hearing before the agency to those same kinds of licensing cases (Br. 27-28). These developments certainly indicate that the right both to a hearing and to review in the court of appeals is tied to the subject matter of the action. But nothing in the legislative history suggests that the propriety of court of appeals review of an agency order is related, not to the substance, but instead to the degree of formality of the underlying agency proceedings.

d. Respondents nevertheless repeatedly insist that the NRC itself has endorsed their reading of Section 189(a). They assert that the agency's administrative pronouncements declare that preliminary proceedings under 10 C.F.R. 2.206 are not "proceedings" within the meaning of Section 189(a). They also maintain that the agency acknowledged as much in its brief below (Resp. Br. 4, 26, 27, 41, 42, 93-96).

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[2]At the time of its enactment, the Atomic Energy Act gave the Atomic Energy Commission authority over many areas other than licensing. See, *e.g.*, 42 U.S.C. 2201(e) (establish communities and grant privileges, leases and permits); *id.* Section 2201(o) (research and development activities); *id.* Section 2201(u) (enter contracts); *id.* Section 2204 (enter electric utility contracts); *id.* Section 2221 (require contractor to demonstrate lack of conflict of interest); *id.* (make just compensation for property taken); *id.* Section 2222 (condemn property); *id.* Section 2278a (prevent trespasses upon Commission installations); 42 U.S.C. (Supp. V) 2114(b) (require non-licensees to perform certain measures regarding byproduct material).

This argument, however, places far too much weight on loosely used language. The NRC's suggestions that prehearing denials of Section 2.206 requests are not "proceedings" plainly were not intended to serve as technical interpretations of that term as it is used in Section 189(a) or Section 189(b). To the contrary, on a fair reading these NRC statements seemingly mean only that the filing of a Section 2.206 request does not initiate a *formal* proceeding to which hearing rights attach as a matter of course. The Commission argued below, for example, that preliminary inquiries must be conducted under Section 2.206 to determine whether "*full* proceedings" (C.A. Br. 23 (emphasis added)) should be instituted. Indeed, in its administrative pronouncements the agency has on occasion characterized prehearing agency action leading to the denial of a Section 2.206 request as "proceedings."[3]

In any event, the Commission has bound itself to take action in response to Section 2.206 requests. The agency must "make an 'inquiry appropriate to the facts asserted,' " (*In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, 7 N.R.C. 429, 432 (1978), aff'd, 606 F.2d 1363 (D.C. Cir. 1979), quoting *In re Consolidated Edison Co. (Indian Point Units 1, 2 & 3)*, 2 N.R.C. 173, 175 (1975)). It also must consider the relevant facts and articulate a proper rationale for its decision (*Northern Indiana*, 7 N.R.C. at 432), and must act on any request that raises a

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[3]For example, in *In re Consolidated Edison Co. (Indian Point Units 1, 2 & 3)*, 2 N.R.C. 175 (1975), the Commission staff engaged in "discussions" with Section 2.206 petitioners but, without holding a hearing, denied the petitioners' request that it issue a show cause order. The Commission nevertheless characterized an intra-agency appeal of the denial as a "proceeding" (2 N.R.C. at 174, 177), and referred to the possibility of "*further* proceedings" in addition to those already held (*id.* at 175, 176 (emphasis added)).

"substantial health or safety issue[]" (*Consolidated Edison*, 2 N.R.C. at 176). As we explained in our opening brief, under any normal reading of the word these preliminary agency actions are encompassed by the statutory term "proceedings" (Br. 21-23).[4]

e. In short, Section 189 uses the word "proceeding" — as it is defined in the APA[5] — to describe any agency process leading to the formulation of an order or the disposition of a "matter" (see 5 U.S.C. 551(6)). The term is used in precisely the same way in the Hobbs Act (Br. 15). And once it is accepted that this reading of the term is proper, respondents' legal argument necessarily collapses. Plainly, the elaborate although informal procedures used to dispose of respondent Lorion's Section 2.206 filing amounted to an agency "process" that led to the "disposition" of a "matter." Because Section 2.206 is concerned with licensing, respondent Lorion's filing initiated a proceeding "of the kind specified in [Section 189](a)." 42 U.S.C. 2239(b). As a result, review in the court of appeals is compelled by the statute.

2. Respondents nevertheless assert what they declare to be a compelling practical reason for having challenges to Section 2.206 denials resolved in the district courts. They

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[4]*In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, 7 N.R.C. 429 (1978), aff'd, 606 F.2d 1364 (D.C. Cir. 1979), which is cited by respondents (Resp. Br. 93-94), is consistent with this reading of the Commission's view. The NRC there explained that 5 U.S.C. 554 and 10 C.F.R. 2.719 apply only to on the record adjudications, and therefore are inapplicable to preliminary denials of Section 2.206 requests. In reaching this conclusion the Commission plainly meant only that the filing of such requests does not necessitate the initiation of formal "enforcement proceedings" (7 N.R.C. at 431); the Commission acknowledged that it was obligated to respond formally to persons who file requests under Section 2.206.

[5]As is noted above, 42 U.S.C. (Supp. V) 2231 makes the APA applicable to the Atomic Energy Act's judicial review and administrative procedure provisions.

note that under the Hobbs Act, which governs judicial review of agency decisions reached in Section 189(a) proceedings, a reviewing court of appeals is to "pass on the issues presented, when * * * no genuine issue of material fact is presented" (28 U.S.C. 2347(b)(2)) — but that the court of appeals must transfer to a district court any appeal that presents such an "issue of material fact." 28 U.S.C. 2347(b)(3).[6] Respondents suggest that many Section 2.206 requests raise genuine issues of fact, so that appeals from denials of such requests inevitably will have to be referred to the district courts without having been passed upon by the courts of appeals (Resp. Br. 6-7, 67-68, 74).

a. Even if otherwise relevant,[7] this argument misreads the Hobbs Act and misstates the nature of judicial review of agency action. The issue on an appeal from the denial of a Section 2.206 request is not, as respondents suggest, whether the petitioner has a factual disagreement with the agency that the court is to resolve de novo (Resp. Br. 79). Instead, the court must determine only whether the agency's decision not to institute action against the licensee was "arbitrary, capricious, an abuse of discretion, or otherwise

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[6]The court of appeals is presented with this choice when a hearing before the agency "is not required by law" (28 U.S.C. 2347(b)(2) and (3)) and the agency has not in fact held a hearing. When a hearing that *is* required by law has not been held, the court must remand the proceeding to the agency so that a hearing may be convened (28 U.S.C. 2347(b)(1)).

[7]Our opening brief and the arguments above demonstrate that under "[t]he language of the statute * * * a decision of the sort at issue here is reviewable in the court of appeals, and nothing in the legislative history points to any different conclusion." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). In these circumstances, respondents' contention that review in the courts of appeals would be impractical "is an argument to be addressed to Congress, not to this Court" (*ibid.*).

not in accordance with law" (5 U.S.C. 706(2)(A)).[8] In making this finding the court is to decide "whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). Thus "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

A review of this sort plainly will not present "issues of material fact," and reviewing appellate courts therefore will not be obligated to transfer such proceedings to the district courts. The reviewing court's role is to settle the legal question whether the agency properly exercised its judgment given the record before it; the court cannot itself resolve issues of fact by "substitut[ing] its judgment for that of the agency" (*Overton Park*, 401 U.S. at 416) or making "some new record" beyond that compiled by the agency (*Camp*, 411 U.S. at 142). This Court has explained that challenges brought under the Hobbs Act — even challenges involving consideration of the factual record developed by the agency — are to be resolved in the courts of appeals without recourse to the district courts, just as reviews of agency orders entered under other statutes typically are conducted. See *FCC* v. *ITT World Communications, Inc.*, No. 83-371 (Apr. 30, 1984), slip op. 4-5. Issues of fact requiring transfer of the case to the district court therefore will be presented

[8]There is no doubt that this standard governs the review of decisions taken under Section 189(a). Section 189(b) explicitly provides that the APA's judicial review standards are applicable in such challenges. In any event, this Court consistently has applied the standards of 5 U.S.C. 706 when reviewing agency action challenged under the Hobbs Act. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 549 (1978); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 n.30 (1981); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-803 (1978).

only when the the agency's factfinding processes are inadequate,[9] or when the case requires the resolution of questions *in addition* to the legal one whether the agency acted arbitrarily or capriciously.[10]

b. Respondents' hints to the contrary notwithstanding, the record compiled by the Commission in its analysis of a Section 2.206 request generally will be more than adequate to allow for effective review in the courts of appeals under the abuse of discretion standard. Although several Section 2.206 denials have been challenged in the courts of appeals (see cases cited at Br. 7), no reviewing panel has found itself unable to determine the propriety of the Commission's decision because of the insufficiency of the record. This is hardly surprising: the record developed by the Commission prior to a ruling on a Section 2.206 request — submissions by the parties and material developed by the agency — is similar to the record considered during the review of any

[9]This reading of the Hobbs Act accords with the principles of judicial review set out in *Overton Park*, where the Court explained that a de novo review is justified under the APA only "when the action is adjudicatory in nature and the agency fact-finding procedures are inadequate," or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action" (401 U.S. at 415). The Court's holdings suggest that these general rules guiding the review of agency decisions are fully applicable in cases reaching the courts of appeals under the Hobbs Act. See, *e.g.*, *ITT World Communications*, slip op. 4-5; *Vermont Yankee*, 435 U.S. at 549.

[10]An example of this principle is provided by what is apparently the only case to find a genuine issue of material fact under Section 2347(b)(3). In *Lake Carriers Ass'n* v. *United States*, 414 F.2d 567 (6th Cir. 1969), the petitioners sought to enjoin enforcement of an FCC order. An independent factual inquiry therefore had to be made to determine whether — apart from the question whether the agency had abused its discretion — the petitioners were threatened with irreparable harm.

informal adjudication or rulemaking.[11] See, e.g., *City of West Chicago* v. *NRC*, 701 F.2d 632, 644-645 (7th Cir. 1983); *Izaak Walton League* v. *Marsh*, 655 F.2d 346, 361-362 & n.37 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981); *Sea-Land Service, Inc.* v. *FMC*, 653 F.2d 544 (D.C. Cir. 1981); *Investment Company Institute* v. *Board of Governors*, 551 F.2d 1270, 1276, 1279-1281 (D.C. Cir. 1977). See generally *Harrison*, 446 U.S. at 593-594; *Camp*, 411 U.S. at 143. Further, directing challenges to the district courts rather than to the courts of appeals will not make review easier or more complete, because *all* courts are constrained by the APA's direction that review be grounded on "the administrative record already in existence" (*Camp*, 411 U.S. at 142). See *Harrison*, 446 U.S. at 594.

In any event, this Court has made it clear that, when there is "such failure to explain administrative action as to frustrate effective judicial review, the remedy [is] not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency * * * such additional explanation of the reasons for the *agency* decision as prove necessary" (*Camp*, 411 U.S. at 142-143). Similarly, when the agency's decision "is not sustainable on the administrative record

[11]Respondents are incorrect in suggesting that the Commission's order in this case either was tainted or was made unreviewable by the participation of agency staff in the investigation and formulation of the decision. See *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363, 1370-1372 (D.C. Cir. 1979). Similarly, respondents' inability to respond directly to all record materials considered by the Commission did not make review of the record impossible. See *Action for Children's Television* v. *FCC*, 564 F.2d 458, 471 (D.C. Cir. 1977). Respondents also complain that the record is flawed because they were denied the opportunity to develop their factual and legal arguments. But they were free to submit whatever material they chose in support of their Section 2.206 request, and remain free at any time to submit another, more detailed petition under the Section.

made," the proceeding must be remanded to the agency for further consideration (*id.* at 143).[12]

c. Building on their earlier argument, respondents nevertheless seem to assert that the Hobbs Act bars such a remand to the agency when the record is inadequate for review in the court of appeals. They appear to maintain that when the appeals court is unable to review the agency's decision and a hearing before the agency is not required by law, 28 U.S.C. 2347(b)(3) requires the transfer of the proceedings to a district court (Resp. Br. 47, 66-67).

Again, respondents' novel reading of the Hobbs Act misreads Section 2347(b)(3) and distorts the import of that provision's reference to issues of material fact. Section 2347(b)(3) was enacted to provide for those circumstances when, because the agency was not required to hold a hearing, it was feared that the record would be inadequate for review and could not be supplemented by the agency.[13] See H.R. Rep. 2122, 81st Cong., 2d Sess. 4 (1950); *Providing for*

[12]Respondents argue at some length that the Commission abused its discretion in denying respondent Lorion's Section 2.206 request (Resp. Br. 98-106). This issue can and should be addressed by the court of appeals on remand. We also note that on February 7, 1984, the Commission promulgated a proposed rule addressing the safety concerns expressed by respondents. 49 Fed. Reg. 4498. Respondents could have commented on that proposed rule, and any challenges to the final rule will of course be reviewable exclusively in the court of appeals.

[13]At the time of the enactment of the Hobbs Act some doubt was expressed about the competence of courts of appeals to review agency action that had not been preceded by a hearing. See *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470 and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No 4 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 28, 81, 87, 91 (1949). Congress nevertheless provided for the review of such orders in the courts of appeals, with the transfer provision of Section 2347(b)(3) provided as a safeguard. See *id.* at 27-28.

the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470 and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the House Comm. on the Judiciary, 81st Cong., 1st Sess. 28 (1949). It is now plain, however, that courts of appeals generally are competent to review agency actions that were not preceded by a hearing, and that agencies may supplement inadequate records without holding hearings. See *Camp*, 411 U.S. at 143. Thus, in cases being reviewed under the Hobbs Act this Court repeatedly has stated that administrative proceedings should be remanded to the agency when "the administrative record is inadequate" for review (*ITT World Communications*, slip op. 5)); the Court never has suggested that Section 2347(b)(3) bars a remand of this sort. See, e.g., *ITT World Communications*, slip op. 5; *Vermont Yankee*, 435 U.S. at 549.[14]

Further, Section 2347(b)(3) can come into play only when material issues of fact must be resolved. As we explain above, however, factual judgments generally will not be material to a court's review of agency action under an abuse

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[14]Respondents plainly are incorrect in asserting (Resp. Br. 49 n.12, 80-81) that a remand to the agency for supplementation of the record would violate the dictates of *Vermont Yankee*. That case held that courts may not impose procedural requirements on agencies in excess of those set out in the APA (435 U.S. at 523-525, 543-544). But the Court recognized that reviewing courts may "remand an agency decision because of the inadequacy of the record," so long as the agency is left free on remand to " 'exercise its administrative discretion in deciding how • • • it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.' " *Id.* at 544, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). Indeed, in *Vermont Yankee* itself the Court directed the court of appeals to determine on remand whether the agency's decision could be sustained on the administrative record; if not, the court of appeals was in turn to remand the case to the agency for further consideration (435 U.S. at 549).

of discretion standard. Courts of appeals therefore have a statutory mandate to "pass on the issues presented" (28 U.S.C. 2347(b)(2)) when reviewing agency action under that standard. For such review to be meaningful, of course, courts will have to remand the case to the agency when "there [is] such a failure to explain administrative action as to frustrate effective judicial review" (*Camp*, 411 U.S. at 142-143). And when the administrative decision under review " 'is not sustainable on the administrative record made, then the [agency] decision must be vacated and the matter remanded to [the agency] for further consideration' " (*Vermont Yankee*, 435 U.S. at 549, quoting *Camp*, 411 U.S. at 143; see *ITT World Communications*, slip op. 5). But cases leading to such remands do not present material factual issues that should be resolved by the courts.[15]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

OCTOBER 1984

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[15]As is noted above, both *Vermont Yankee* and *ITT World Communications*, where remands of this sort were approved, involved agency action reviewed under the Hobbs Act.